

STATE OF MICHIGAN  
COURT OF APPEALS

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In the Matter of ETHAN RYAN SMITH, Minor.

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PEOPLE OF MICHIGAN,

Petitioner-Appellee,

v

ETHAN RYAN SMITH,

Respondent-Appellant.

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UNPUBLISHED

October 9, 2007

No. 270135

Clinton Circuit Court

Family Division

LC No. 05-018241-DL

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Respondent appeals as of right from his bench trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age). We affirm.

Respondent asserts that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, respondent must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Respondent argues that his trial counsel's failure to request a competency hearing constitutes ineffective assistance. Juveniles possess a due process right not to be subjected to adjudicative proceedings while incompetent. *In re Carey*, 241 Mich App 222, 226; 615 NW2d 742 (2000). Statutory procedures for determining competency of adults in criminal cases, MCL 330.2020 *et seq.*, may serve as a guide for juvenile competency determinations. *In re Carey*, *supra* at 226. However, "in juvenile competency hearings, competency evaluations should be made in light of juvenile, rather than adult, norms" *Id.* at 234.

Under the statutory scheme, a defendant is presumed competent to stand trial and "shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." MCL 330.2020(1). The statute requires an accused have the mental ability at the time of trial to understand the charges against him and be able to knowingly assist in his defense. *People v McSwain*, 259 Mich App 654, 692; 676 NW2d 236 (2003).

In this case, evidence was presented during the dispositional phase of this proceeding that respondent was developmentally delayed in several respects. Evidence was also presented that he suffers from Tourette's syndrome, as well as obsessive compulsive and attention deficit hyperactivity disorders. Although respondent was required to repeat both the first and eighth grades, his intellectual functioning was determined to be in the average or high average range and his performance on perceptual, verbal, reading, math, writing, and memory tests was generally in the low to high average ranges, with significant weaknesses only noted in processing speed and sustained attention scores. There is no evidence in the record that behavioral or comprehension problems impaired respondent's ability to participate in the proceedings. It appears that respondent had adequate memory of the events at issue to assist his trial counsel.

From this evidence, there does not appear to be a reasonable probability that an attorney could have demonstrated that respondent was not competent to stand trial. Especially when viewed in light of juvenile norms, it appears that respondent was capable of understanding the charges against him and knowingly assisting in his defense. *McSwain, supra* at 692. Accordingly, it cannot be said that respondent was denied a fair trial on this basis.

Respondent next argues that his trial counsel was ineffective for failing to present evidence that he lacked the requisite intent to commit the crime. But CSC I is a general intent crime. *People v Langworthy*, 416 Mich 630, 643-644; 331 NW2d 171 (1982). Accordingly, petitioner was not required to prove respondent had any intent "other than that evidenced by the doing of the acts constituting the offense." *Id.* at 644, quoting 75 CJS, Rape, § 9, p 471. Respondent's counsel attempted to introduce expert testimony whether respondent had the requisite capacity to commit the crime charged. That counsel did not further assert that the evidence should be permitted cannot be considered error because testimony concerning respondent's mental condition was not relevant to whether the act was committed. A claim of ineffective assistance of counsel cannot be premised on the failure to make a meritless argument. *Rodgers, supra* at 715.

Respondent next asserts that the fact that his trial counsel only called one witness shows a lack of preparation. Decisions regarding whether to call or question a witness are presumed to be matters of trial strategy. *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not second guess trial counsel on his decisions regarding the presentation of witnesses, particularly where respondent has not identified any other witnesses trial counsel should have called or to what they might have testified.

Respondent further asserts that his trial counsel failed to object to inadmissible and prejudicial hearsay testimony. Respondent specifically challenges counsel's failure to object to testimony given by an officer who interviewed both respondent and the complainant. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless it fits within a recognized exception under the rules of evidence. MRE 802.

However, certain out-of-court statements offered to prove the truth of the matter asserted are not considered hearsay at all and therefore need not fit within a recognized exception to be admissible. Of relevance here, a statement is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity . . . ." MRE 801(d)(2). Respondent's statements are clearly not hearsay under this rule as he was a

party to this case, the statements were his own, and they were being offered against him. Further, while the officer once referred to the complainant's trial testimony, the officer did not repeat any out-of-court statements the complainant made to her. Thus, respondent's trial counsel did not err by failing to raise a meritless hearsay objection. *Rodgers, supra* at 715.

Respondent also asserts that his trial counsel erred by failing to object to the admission of respondent's statements to the officer on the basis that the statements were not voluntarily obtained and that respondent was deprived of his right to counsel when questioning did not cease after his parents allegedly invoked his right to counsel. See *In re SLL*, 246 Mich App 204, 209; 631 NW2d 775 (2001).

Here, *Miranda*<sup>1</sup> warnings were not required because respondent was in custody when the officer questioned him. *Id.* at 210. Nor was compliance with MCL 764.27 at issue because respondent was not under arrest when interviewed by the officer. Further, respondent's parents initially agreed to the officer's request that she be allowed to speak with respondent alone. Midway through the interview, respondent's parents joined the officer and respondent and were present for the remainder of the interview. There is no indication that the interview was prolonged or that respondent was under duress. Furthermore, respondent was 15 years of age when the interview occurred and of at least average intelligence. On the basis of these facts, it cannot be said that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. There is no reasonable probability based on the above facts that but for counsel's failure to object, respondent's statements would not have been admitted. *Rodgers, supra* at 714. Rather, it appears from the evidence of record that under the totality of the circumstances respondent's statement was voluntarily made. *In re SLL, supra* at 209.

Respondent argues that his trial counsel could have rebutted the officer's testimony by calling respondent's stepfather and his mother as witnesses because they would have testified that they were told they could not be present during the interrogation and that the officer continued to question respondent after they requested she stop until they obtained an attorney for respondent. But respondent did not prove these claims by making a testimonial record in the trial court. *Id.* at 713-714. Without such a record, respondent has failed to meet his heavy burden of overcoming the presumption counsel provided effective assistance. *Id.* at 714.

Respondent next argues that his counsel was ineffective because he failed to hold the prosecution to its burden of proof when he failed to argue that respondent did not have the requisite intent to support conviction. However, respondent's trial counsel argued that the act did not occur as described by the complainant at trial, and, thus, required petitioner to prove general intent by proving the act occurred. *Langworthy, supra*.

Respondent additionally asserts that in his closing argument his counsel erred by misstating in a prejudicial manner the testimony of respondent's stepfather. Respondent has not overcome the presumption that counsel was pursuing a reasonable strategy aimed at admitting that some sexual play occurred, while denying that any acts of penetration occurred.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Considering all the evidence, this limited concession is not the type that constitutes ineffective assistance of counsel. *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

Respondent also asserts that he was denied effective assistance of counsel when counsel waived his right to a jury trial. Although not constitutionally required, *In re Whittaker*, 239 Mich App 26, 28; 607 NW2d 387 (1999), the court rules provide for a right to a jury at the trial in juvenile proceedings. MCR 3.911(A). But MCR 2.508(D)(3) provides that a demand for a jury trial may be withdrawn only with the consent of the parties or their attorneys expressed in writing or on the record. At the preliminary hearing, the trial court questioned whether respondent had initially filed a jury demand, but the trial date had been set for a non-jury day. Respondent's trial counsel asked for a moment off the record. When he returned to the record, he stated, "I had a brief conversation as far as with the parents of my client and they stated that a non-jury trial would be satisfactory." Because respondent's attorney withdrew the demand for a jury trial on the record after consulting with respondent's parents, the court rules concerning withdrawal of a jury demand were satisfied. Moreover, respondent has not suggested how the outcome of this case would have been different if a jury trial had been held or even that choosing a bench trial over a jury trial was not a matter of sound trial strategy. Thus, respondent has failed to overcome the presumption of effective assistance as it relates to the decision to waive a jury trial. *Rodgers*, *supra* at 714.

Respondent also complains that his trial counsel failed to file a post-trial motion for a new trial despite alleged assurances to respondent's parents that he would do so.<sup>2</sup> Yet, there is nothing in the record to support respondent's allegation that his counsel agreed to file any post-trial motions. In any event, respondent has not identified any errors but for which the outcome of the proceedings would have been different. Accordingly, because there is no reasonable probability that a motion for a new trial would have been successful, respondent's counsel cannot be considered ineffective on the basis of failing to file such a motion. *Id.*

Finally, respondent asserts that the cumulative effect of the alleged errors addressed above may warrant reversal although the errors looked at individually would not. But there must be actual errors in order to be aggregated. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). No error having been established, there can be no cumulative effect.

Respondent next claims that the trial court erred by excluding the testimony of certain proffered expert witnesses. Respondent sought to present several mental health professionals as expert witnesses to testify as to whether respondent had the requisite mental capacity to commit CSC I. The trial court determined that the expert testimony was not necessary to determine whether respondent committed the charged acts.

A trial court's ruling on the admission of expert testimony is reviewed for an abuse of discretion. *People v Phillips*, 246 Mich App 201, 203; 632 NW2d 154 (2001). If scientific, technical, or other specialized knowledge will assist the trier of fact in determining a fact in issue, a witness qualified as an expert may testify to that knowledge, provided the data,

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<sup>2</sup> We note that respondent's appellate counsel also did not file such a motion.

methodology, and theories the expert employs to draw conclusions is reliable. MRE 702; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004).

Respondent asserts that the proffered expert testimony was relevant to whether he had the requisite intent to commit CSC I. Again, however, CSC I is a general intent crime. Accordingly, the prosecution was not required to prove respondent had any intent “other than that evidenced by the doing of the acts constituting the offense.” *Langworthy, supra* at 644 (citation omitted). Respondent seems to suggest that the proffered experts might have testified that the acts undertaken by respondent were not volitional. However, such an argument is a backdoor attempt to make an insanity argument,<sup>3</sup> without complying with the procedural requirements of an insanity defense. See *People v Carpenter*, 464 Mich 223, 231; 627 NW2d 276 (2001). In *Carpenter*, our Supreme Court abolished the diminished capacity defense in Michigan, finding that the Legislature intended that in the context of mental illness or retardation, only legal insanity could reduce criminal responsibility by negating specific intent. *Id.* at 241. The reasoning adopted in *Carpenter* is equally applicable to the general intent crime at issue here. Moreover, it is not clear that the insanity defense is applicable to juvenile proceedings under Michigan law. *In re Ricks*, 167 Mich App 285, 289; 421 NW2d 667 (1988). Accordingly, the trial court did not abuse its discretion by refusing to admit the testimony of respondent’s proffered experts because there were no facts in evidence that required or were subject to expert examination and analysis.

Finally, respondent challenges the sufficiency of the evidence supporting his conviction. We review challenges to the sufficiency of the evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), considering the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

A conviction of CSC I under the provision at issue here requires the prosecution to prove that respondent engaged in sexual penetration with another person and that the other person was under 13 years of age. MCL 750.520b(1)(a). Sexual penetration is “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL 750.520a(p).

At the time of the events giving rise to this proceeding, the complainant was six years old. Respondent’s stepfather testified that when he called respondent and the complainant into the house on August 1, 2005, he saw respondent stand-up while pulling up his pants. The complainant testified that on August 1, 2005, respondent urinated in his “butt” and put his penis

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<sup>3</sup> MCL 768.21a(1) provides in part: “An individual is legally insane if, as a result of mental illness . . . or as a result of being mentally retarded . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.”

inside the complainant's "butt" and mouth. He testified that on previous occasions, respondent had put his penis and fingers in the complainant's anus. There was police testimony that respondent admitted to lying on Joshua and urinating on him on August 1, 2005 and to prior acts of fellatio. The nurse who examined the complainant testified that he told her respondent had urinated in his butt on August 1, 2005 and that they had engaged in various acts of sexual penetration on other occasions. She also noted that the complainant's penis had reddened tender areas along the posterior glans and shaft and that he had a scar near his anus. Scientific evidence also indicated the presence of an enzyme found in saliva on the complainant's penis and foreign DNA.

Respondent points out some inconsistency in the complainant's testimony and that there is no indication in the complainant's initial descriptions of the incident that respondent had engaged in acts of sexual penetration on August 1, 2005. Respondent also notes that it was not established that the DNA evidence found on the complainant's penis was his, that no DNA belonging to someone other than the complainant was found in the anal swabs and smears taken from him, and that the evidence that the complainant had penile tenderness and anal scarring was not necessarily indicative of sexual assault.

We disagree with respondent's arguments that the evidence was insufficient. The complainant's credibility was for the trier of fact to resolve, and the trial court clearly indicated that it found the complainant's testimony credible. Further, the lack of DNA evidence found on the anal swabs and smears does not require the conclusion that no anal penetration occurred on August 1, 2005. Sexual penetration does not require the emission of semen. MCL 750.520a(p).

Considering the evidence in the light most favorable to petitioner, a rational trier of fact could have found respondent guilty of the charged crime beyond a reasonable doubt.

We affirm.

/s/ Kathleen Jansen  
/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey